Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-161

MEDLIN MARINE, INCORPORATED,
Petitioner,

vs.

MRS. ALANA G. HEIMAN, in Her Own Right; SANDRA JEAN HEIMAN, by MRS. ALANA G. HEIMAN, Her Mother and Next Friend; and H. MAURICE MITCHELL and JOSEPH W. GELZINE, Co-Administrators in Succession With Will Annexed of the Estate of Max Heiman, Deceased, and MARINE DEVELOPMENT CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF MARINE DEVELOPMENT CORPORATION IN OPPOSITION

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OPINIONS BELOW

The per curiam order of the Court of Appeals is unreported and appears in petitioner's Petition for Writ of Certiorari in the Appendix, pages A-1-2. The original unreported opinion of the Court of Appeals appears in petitioner's Petition for Writ of Certiorari in the Appendix, pages A-3-22. The unreported

supplemental memorandum opinion of the District Court appears in petitioner's Petition for Writ of Certiorari in the Appendix, pages A-23-25. The unreported memorandum opinion of the District Court appears in Petitioner's Petition for Writ of Certiorari in the Appendix, pages A-26-48. The unreported Findings of Fact of the District Court appear in the petitioner's Petition for Writ of Certiorari in the Appendix, pages A-49-60.

JURISDICTION

The Judgment by way of per curiam order of the Court of Appeals was entered on May 14, 1976. A timely Petition for Rehearing was denied on May 7, 1976 and petitioner's Petition for Writ of Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, under Federal Maritime Law, the Court of Appeals for the Eighth Circuit properly held that Medlin Marine, Inc., was not entitled to indemnity from Marine Development Corporation.

2. Whether the trial court erred in projecting a specific rate of inflation over Max Heiman's life expectancy in measuring damages for loss of future earnings.

STATEMENT OF THE CASE

This is an admiralty case originally brought in Federal District Court for the Eastern District of Arkansas under the provisions of Federal Rules of Civil Procedure 9(h). Max Heiman died aboard a pleasure yacht from carbon monoxide asphyxiation

on the night of September 1, 1973. His wife, Alana, and daughter, Sandra, were injured. An action was commenced by the estate of Max Heiman and by his wife and daughter against Boatel, the manufacturer of the boat; Kohler, the manufacturer of a gasoline powered generator on the boat; Marine Development Corporation (hereinafter sometimes referred to as respondent Marine) the manufacturer of air conditioning component parts, which were sold to Boatel to be used in the air conditioning system on the Heiman yacht; and the petitioner, Medlin Marine, Inc., the retailer of the boat.

Recovery was sought against defendants on the bases of negligence, breach of implied warranties and strict liability. Being in Admiralty, the case was tried before the Honorable Judge G. Thomas Eisele. At the close of the evidence, the Court made separate Findings of Fact and Conclusions of Law. The manufacturer, Boatel, being in default, was found liable on the bases of breach of implied warranty, negligence and strict liability. (Pet.App.A.-49). The seller, Medlin, was found liable on the bases of strict liability and breach of implied warranty. (Pet.App.A-49). The Court found that the generator manufacturer, Kohler had no duty to warn and therefore was not liable. (Pet.App.A-33). The air conditioning component part manufacturer, Marine Development Corporation, was found liable for negligent failure to warn. (Pet.App.A-57). The trial court apportioned fault between Boatel and Marine, finding 80% attributable to Boatel and 20% to Marine. (Pet.App.A-47). The Court, by supplemental opinion, found that the fault of Medlin was equal to the negligence of Marine, and that neither was entitled to indemnity from the other. (Pet.App.A-24-25).

In assessing the damages against Medlin and Marine for the decedent's loss of future earnings, the Trial Court used an inflation factor based on the testimony of an economist to adjust the award upwards and thereby minimize the effect of reducing it to present value.

Petitioner appealed the lower court's decision to the Eighth Circuit Court of Appeals on two questions: its right to indemnity from Marine Development and the propriety of the trial court's use of an inflation factor in computing damages. The Eighth Circuit originally found that Medlin was entitled to indemnity from Marine Development and that the lower court erred in allowing the economist to testify concerning future inflationary trends. The Court of Appeals, finding that the introduction of the economist's testimony did not constitute reversible error, allowed the trial court's assessment of damages to stand.

Upon a rehearing en banc, the Eighth Circuit withdrew its earlier Opinion and reinstated the lower court's judgment.

ARGUMENT

The Decision Below Properly Denied Indemnity, Based on the Trial Court's Finding That the Fault of Medlin Was Equal to the Negligence of Marine.

The case was tried to the court without a jury over an eleven-day period. The trial court, at the close of all the evidence, made specific Findings of Fact and Conclusions of Law orally from the bench on March 4, 1975 (Pet.App.A-49-60). On March 7, 1975, by way of memorandum opinion, the court made additional findings as to damages and liabiiity. (Pet.App.A-26-48). The specific ruling that petitioner was not entitled to indemnity from respondent Marine was subsequently decided by the trial court in a separate opinion after both petitioner and Marine had submitted briefs on the issue and the trial court had carefully reviewed the evidence and findings. (Pet.App.A-23-25).

Respondent Marine contends that the Court of Appeals erred in holding it liable for failure to warn and has filed a Separate Petition for Writ of Certiorari (October Term, 1976; No. 76-160) on that issue. Marine respectfully submits that if it is liable, then the trial court's findings that petitioner and respondent Marine were equally at fault is not "clearly erroneous" under Rule 52 of the Federal Rules of Civil Procedure.

Petitioner contends that the effect of the action of the Eighth Circuit was to hold that under Federal Maritime Law, a non-negligent party is not entitled to indemnity from a party whose negligence actually caused the wrong complained of. This statement is misleading in that it completely ignores the court's finding that both Medlin and Marine were equally at fault. Petitioner relies heavily on the trial court's finding that it was not negligent and that its liability was based solely on its position in the chain of distribution. This was only one of many findings made by the trial court. In fact, as to the finding relied on by

petitioner, the trial court issued a caveat that it might file additional findings even with respect to the issues covered. (Pet.App. A-49). The trial court did in fact make additional findings, and on the issue of indemnity as between petitioner and respondent Marine, it stated:

> "It is true that the court has heretofore apportioned the fault predicated upon negligence as between the two defendants held to be negligent, i.e., Boatel and Marine Dvelopment, but it has not made any determination of the comparative fault between the defendant Medlin and the defendant Marine, or any other defendant. . . . [T]he error of Medlin is in assuming because of the Court's finding that Medlin's liability was one based simply upon Medlin's legal position as the retailer of the boat, that Medlin is 'without fault.' The truth is that the law of strict liability implies fault. Medlin chose to deal with Boatel and to place the latter's product in the hands of the public. . . .
>
> "After analyzing the precedents cited by both Medlin and Marine the Court is convinced that we are dealing with a problem of contribution among tortfeasors rather than the question of tort indemnity. The problem, however, is that we are called upon to compare the fault of one held liable on a theory of strict liability with the fault of another held liable on a theory of negligent failure to warn.
>
> ". . . It is open to the Court to determine where the law should rest as between the two other defendants, whose fault is so much less, relatively, than Boatel, then the Court would find it most difficult to find greater fault on the part of one than on the other, viewing 'fault' in the light of the facts and the policies and attitudes reflected in the law concerning negligence and strict liability." (Pet.App.A-24-25).

Strict liability implies fault, and policywise, the tort of strict liability is a more serious tort than the tort of ordinary negli-

gence. *Kossifos v. Louden Machinery Co.*, 317 N.E.2d 740 (Ill.App.1974).

The trial court specifically stated that its apportionment of fault between Boatel and Marine was not in any way determinative of the relative fault between Medlin and Marine. Rather, the court held that Medlin was in fact guilty of fault in dealing with Boatel and in placing Boatel's product in the hands of the public. In apportioning fault between Boatel and Marine, the trial court found Boatel 80% at fault and Marine 20% at fault. (Pet.App. A-47). How can Marine which is only 20% at fault be "solely" at fault? How can Medlin which is "equally" at fault be said to be innocent? The trial court specifically stated in its findings that the apportionment of fault predicated upon negligence, between Boatel and Marine, was only between those two defendants, and was not a determination of comparative fault between petitioner and respondent Marine, nor any other defendant. (Pet.App. A-24). The "culprit", the principal (i.e., "primary" or "sole") wrongdoer was Boatel, not Marine, as the trial court held. Based on the cases cited by petitioner, the trial court correctly allowed indemnity to petitioner from Boatel, and correctly denied indemnity from Marine. (Pet.App. A-24).

The problem is one of contribution among tortfeasors rather than indemnity, as the trial court held. (Pet.App. A-24). Admiralty law allows contribution among joint tortfeasors in a non-collision admiralty case. *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974). The trial court's finding that Marine and Medlin were joint tortfeasors is not "clearly erroneous," but, to the contrary, is well supported by the facts and law. For these reasons, respondent Marine, respectfully submits that the Petition for Writ of Certiorari filed by petitioner should not be granted on this point since Rule 19 requires "special and important reasons therefor" and no such reasons are present in this case.

The Circuit Courts Are Not in Agreement on the Question of Whether Federal Admiralty Courts May Consider Future Inflationary Trends in Awarding Damages for Future Earnings.

Respondent Marine joins petitioner in praying that a Writ of Certiorari be issued, but solely for the purpose of reviewing the Judgment and Opinion of the Eighth Circuit on the issue of whether the courts may consider future inflationary trends in awarding damages for future earnings in an admiralty case.

In *Petition of United States Steel Corp.*, 436 F.2d 1256 (6th Cir. 1970), the court stated at page 1279:

> "The second issue concerns the Commissioners' failure to discount to present value the awards for future damages in all of the cases. The Commissioners' refusal to include in their computation of damages a reduction of future damages to present value was based upon their assumption that inflationary trends resulting in a loss in the purchasing power of the dollar by 4% per annum would offset any reduction to present worth at 4% simple interest. This was error. It is well settled that an award for future damages must be reduced to present value in order to take into account the earning power of that money. *Chesapeake & Ohio Ry v. Kelly*, 241 U.S. 485, 491, 36 S.Ct.630, 60 L. Ed. 1117 (1916). It is equally well settled in this Circuit that the prospect of future decline in the purchasing power of the dollar may not be used to offset the reduction to present value. *Sleeman v. Chesapeake & Ohio Ry.*, 414 F.2d 305 (6th Cir. 1969)."

Riha v. Jasper Blackburn Corp., 516 F.2d 840 (8th Cir. 1975), was decided by the Eighth Circuit prior to *Johnson v. Serra*, 521 F.2d 1289 (8th Cir. 1975), one of the cases relied upon by petitioner. Though not an admiralty case, the *Riha* opinion points out that not only the federal courts, but also the

state courts are divided on the issue of whether testimony of inflationary trends should be considered in assessing damages. (516 F.2d at 844). In *Johnson* the Eighth Circuit noted that in federally created claims, the majority of the federal courts have rejected consideration of future inflationary trends. (521 F.2d at 1295-6). In affirming the lower court's decision on this point, the Eighth Circuit took a position contrary to several other circuits and to its own prior decisions.

In summary, the use of future inflationary trends, whether based upon expert testimony or simply on the personal experience of the trier of facts, is merely an artifice employed to circumvent the well recognized principle that tort damages must be reduced to present value. As Judge Ross succinctly stated in his dissenting opinion:

> "I also dissent from the affirmance of the award of over half a million dollars in damages. It is inconceivable to me how—when 'economists have fared only slightly better than fortune tellers and soothsayers' and the prediction of inflationary or deflationary trends by an expert is 'to a considerable extent speculative and conjectural'—we can allow a federal judge to do what the acknowledged experts in the field cannot; that is to project a specific annual inflation rate over a person's life expectancy." (Pet.App.A-21)

CONCLUSION

1. The Petition for a Writ of Certiorari on the question of indemnity should be denied.

2. The Petition for a Writ of Certiorari on the question of whether in an admiralty case the federal courts may consider future inflationary trends in awarding damages for future earnings should be granted.

Respectfully submitted,

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